Supreme Court, U.S.
FEB 7 1994

93-717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL G. TYSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's review is warranted to determine whether the method by which cases were formerly assigned to the various judges in Marion County, Indiana, comports with Due Process, where that system is no longer in use and petitioner admitted on the record that the judge chosen by that method was impartial.

2. Whether this Court's review is warranted to determine whether a case-specific application of Indiana caselaw that was designed to protect criminal defendants' Sixth Amendment rights was correct.

3. Whether this Court can or should review the exclusion of evidence under the State's rape shield statute where the state court's holding rested on the adequate and independent state law ground that petitioner did not take the steps necessary to preserve the issue for review.

4. Whether this Court can or should review a state court's determination that the evidence was insufficient to support the giving of an instruction on a state-law defense.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

Respondent does not dispute the dates of the filings and orders in this case that are set forth in petitioner's jurisdictional statement. Respondent does dispute whether two of the issues raised by petitioner fall within the terms of 28 U.S.C. § 1257(a). In particular, the state court's resolution of petitioner's Issues III and IV both rested on adequate and independent state law grounds. *See infra* at 15-19.

STATEMENT

1. Petitioner Michael G. Tyson was convicted of forcible rape and sexual deviate conduct by a jury in the Superior Court of Marion County, Indiana. The evidence against Tyson was considerable. This evidence consisted of physical and medical evidence demonstrating that the victim was forcibly raped, testimony of the victim, and testimony of witnesses who corroborated the victim's version of events.

For example, Dr. Thomas Richardson testified that the victim had wounds on the opening of her vagina that were "caused by frictional force." R. 3699. To inflict such wounds, "basically it takes a lot of force." R. 3700. Dr. James Akins offered his professional opinion that the victim's injuries were "incredibly unlikely to happen from consensual sex." R. 3797. By contrast, Tyson's only expert witness, Dr. Margaret Watanabe, testified that she could form no opinion as to whether the victim's injuries were caused by consensual sex. R. 4679.

The victim's testimony was corroborated by four witnesses who each testified that the victim told them that Tyson had raped her. R. 3013, 3016-17 (Kycia Johnson); 4030-31 (Stacy Murphy); 4091-94 (Charrisse Nelson); 4129-30 (Officer Cynthia Johnson). Several employees of the Canterbury Hotel, where Tyson committed the rape, also offered testimony that was consistent with the victim's version of events. R. 3373-3518.

The testimony of Tyson's limousine driver, Virginia Foster, who drove Tyson and the victim to the Canterbury Hotel and later drove the victim back to her hotel, likewise offered testimony that supported Tyson's guilt. Ms. Foster explained that when the victim returned to the limousine after the rape, she was "all frantic" and "in a state of shock." R. 3633. The victim uttered repeatedly to her: "I don't believe him. Who do [*sic*] he think he is? He's just a bad person." R. 3632-33.

The victim also offered graphic and detailed testimony that was consistent only with a violent rape. R. 3144-53.[1] Tyson, in irreconcilable conflict with the victim's testimony, described an encounter that is consistent only with consensual intercourse. According to Tyson, the victim fully disrobed herself for him, and then, while he was performing oral sex on her, told him to "come up," meaning that "she wanted me to insert my penis in her." R. 5023-24.

Furthermore, on matters central to his defense, Tyson's testimony contradicted his grand jury testimony. For instance, at trial Tyson maintained that he had made clear to the victim prior to their meeting of July 19, 1991, that he intended to have sex with her. According to his trial testimony, Tyson crassly told the victim "I want to f--- you," to which she responded, "Sure, just give me a call." R. 5000. Tyson asserted that it was his general practice upon initially meeting a woman to be direct in expressing his interest in sex with her. "That's just the way I am. I just want to know what I'm getting before I'm getting into it." R. 5000-01.

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[1] Nor was the victim's testimony in any respect ambiguous. The testimony on which petitioner relies, regarding the his offer to allow the victim to "be on top," in its context, is set forth below:

> Q: Did you change position?
>
> A: At one point, he said, "Oh, you're crying," and he stopped for a second and his voice started to, like be a little bit normal again, and then he just turned evil again, and really mean, and his eyes got all mean, and he just kept going really hard, and then he goes, like, "Well, do you want to be on top?" and I thought I could get away. So I said, "Yeah," and I was crying when I said it, and he flipped over. Then I tried to get away, and he was, like, "I told you not to fight me," and he slammed me back down again and rolled back over again.

Pet. App. 82.

Before the grand jury, however, Tyson did not testify that this conversation ever occurred, despite being asked repeatedly to relate any and all statements or comments made between him and the victim. R. 5053-54. Quite the opposite, Tyson told the grand jury that he generally made his sexual intentions known to women gradually and indirectly, preferring to engage in lengthy small talk before pursuing sex. R. 5045-55.

Having heard his testimony and witnessed his demeanor, the jury convicted Tyson of forcible rape and sexual deviate conduct, and he was sentenced to six years in prison. R. 1682-83. Under Indiana's day-for-day good time system, he will likely be incarcerated for only three years. *See* Ind. Code § 35-50-6-3.

2. The Indiana Court of Appeals affirmed Tyson's conviction. Pet. App. 1. The court found that the method by which this case was assigned to the trial court did not warrant reversal because there was no evidence of bias or prejudice on the part of the judge. Pet. App. 95-103. The court also found that the trial court did not abuse its discretion in excluding the testimony of three witnesses based on Tyson's prejudicial breach of a trial-court discovery order. The appellate court reasoned that the witnesses' proposed testimony was not "critical" to Tyson's case because it was intended merely to impeach the victim on a collateral matter, *i.e.*, whether the defendant and the victim had been holding hands or embracing outside the hotel, not whether he later raped her. The court also found that allowing this testimony would have required a continuance of the trial of possibly several weeks. Pet. App. 6-46. The Indiana Court of Appeals next held that the trial court did not abuse its discretion in declining to give an instruction tendered by Tyson on reasonable mistake of fact as to the victim's consent. Based on its construction of this state-law defense, the court concluded there was no evidence in the record to support the giving of this instruction. Pet. App. 63-90.

Finally, the Indiana Court of Appeals held that Tyson waived, through a procedural default, any issues regarding the exclusion of evidence under the Indiana rape shield law. Pet. App. 46-53

3. Tyson sought discretionary review and reversal of his conviction by the Indiana Supreme Court. The Indiana Supreme Court declined even to grant review of the case. Pet. App. 146.

REASONS TO DENY THE WRIT

This case does not present "special and important reasons," SUP. CT. R. 10.1, for the exercise of this Court's discretionary certiorari jurisdiction. Rather, as shown below, the issues are largely fact-bound, and are unlikely to have any substantial impact beyond the immediate parties. The method of case allocation raised by petitioner's Issue I is no longer in use in the state trial court, and petitioner has not even claimed that it is used in other parts of the country. The exclusion of petitioner's tardily-disclosed witnesses (Issue II in the petition) was evaluated by the state courts in accordance with a highly fact-specific balancing test developed under Indiana caselaw to weigh the defendant's Sixth Amendment interests against the legitimate demands for orderly procedure required by the adversary process — caselaw that is arguably *more* protective of a defendant's rights than existing Sixth Amendment caselaw. The jury instruction issue (Issue IV in the petition) was decided against petitioner by the state court on the ground that he had not adduced evidence that would support the instruction. A decision by a state court that a state defendant did not produce enough evidence to warrant an instruction on a state-law defense does not even present a federal question within this Court's certiorari jurisdiction, but even if it did, again, review by this Court would be highly fact-bound, and would have no impact beyond the parties to this case. Finally, the rape-shield issue (Issue III in the petition), was, as the state court held, not properly preserved

for review. This decision also represents an adequate and independent state law ground precluding certiorari jurisdiction. Again, even if there were no jurisdictional bar, review of this question would require a tedious case-specific inquiry, the outcome of which would provide little or no guidance to the lower courts.

The petition makes virtually no attempt to show how this case could possibly meet the standards this Court normally applies in determining whether to grant certiorari, but concentrates instead on an effort to persuade the Court that petitioner's individual claims of error have merit. That alone is not sufficient to warrant the extraordinary exercise of this Court's discretion to grant certiorari. Secondarily, but nonetheless important, the state court's resolution of the case was correct in any event. Accordingly, this case does not warrant the "commitment of scarce judicial resources" that a grant of certiorari represents, *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), and the writ should be denied.

I. THIS COURT SHOULD NOT REVIEW A SYSTEM OF CASE ALLOCATION NO LONGER IN USE, ESPECIALLY WHEN PETITIONER CONCEDED ON THE RECORD THAT THE JUDGE TO WHOM THE CASE WAS ASSIGNED WAS IMPARTIAL.

Petitioner has not even *claimed* that the Indiana Court of Appeals' decision rejecting his challenge to the case allocation system formerly used in Marion County, Indiana, creates a conflict with other federal decisions, or even with other decisions from the state courts.[2] Nor has he claimed that a

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[2] In the state courts, petitioner claimed that the decision conflicted with the Louisiana Supreme Court's decision in *State v. Simpson*, 551 So. 2d 1303 (La. 1989). He does not renew that claim in this Court, and for good reason: even the Louisiana courts have applied a harmless error analysis to such claims. *State v. Claxton*, 603 So. 2d 247, 249 (La. App. 1992); *State v. Kimmel*, 571 So. 2d 208, 210 (La. App. 1990).

similar system is in widespread use elsewhere, or even that such a system is in use anywhere else at all. Accordingly, this case simply does not present an issue of widespread national importance, of the type that usually impels the Court to grant certiorari.

Moreover, the method of case allocation challenged by petitioner is no longer in use even in the Marion County courts. Effective January 1 of this year, all criminal cases in those courts are "assigned to an individual courtroom on a random basis." Amended Rules of Organization and Procedure for the Marion Superior Court, Criminal Division, Rules 1(a) (November 23, 1993); *see also id.*, Rules 3(b), 4 (requiring indictments returned by regular and special grand juries to be "filed pursuant to Rule 1"). There is no reason for this Court to pass on the validity of a case allocation system that the state courts have already decided to abandon.

Finally, there is no reason to grant review because the Indiana Court of Appeals' decision was correct. As the state

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Such an analysis is the functional equivalent of the Indiana Court of Appeals' holding that, absent a showing of actual bias or other prejudice, there is no due process violation.

The New York trial court decision on which Tyson relies, *McDonald v. Goldstein*, 83 N.Y.S. 620 (Sup. Ct. Kings County 1948), did not involve a challenge, constitutional or otherwise, to the court's system for assigning cases, but rather involved the district attorney's resistance to a court-ordered change from a system where he had previously enjoyed the authority to make up the court's calendar, including the assignment of cases to particular judges. Significantly, in affirming, the Appellate Division mentioned none of the concerns with the prior practice noted by the trial court. *See* 79 N.Y.S. 690. *Cruz v. Abbate*, 812 F.2d 571 (9th Cir. 1987), upon which Tyson also relies, did not involve a claim challenging the system by which cases were assigned (there at the discretion of the presiding judge), but rather an allegation that the person who made the assignments "has displayed arbitrariness and unfairness and has failed to comply with the principles of objectivity and impartiality." 812 F.2d at 574.

court unanimously found, petitioner was tried before an impartial judge. *See* Pet. App. 98-100 (Majority opinion); *id.* at 106-07 n.34 (Dissent).[3] Indeed, petitioner's claims that the trial judge was biased are particularly offensive, given that his counsel expressly conceded on the record that she was not:

> Your Honor, I'd like to address very briefly the brief record that we've just established and not for the Court that *we certainly have no basis to suggest that Your Honor harbors any kind of bias in this case.*

R. 5683 (emphasis added).

As this Court has explained, in a case which Tyson himself cites, "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948); alterations by the Court); *see id.* ("The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); alterations by the Court). Indeed, the Court has stressed that even a violation of the Canon of Judicial Conduct requiring a judge to disqualify himself where he has a personal bias or prejudice concerning a party "would not be a sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* Rather, the Court emphasized that the guidelines of due

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[3] The dissent noted there was "absolutely no evidence or permissible inference that [the trial judge] acted in any manner other than with total lack of bias or prejudice," and further noted that, while the dissenter believed some of the trial court's rulings erroneous, he nonetheless believed the trial court "acted with complete and unswerving judicial integrity and impartiality."

process give the states substantial latitude in such matters. *Id.* at 821.

Thus, those cases where this Court has found a due process violation because of the judge that presided over particular proceedings have invariably involved a direct, personal, substantial pecuniary interest in the outcome of the case, *see Tumey* (judge would receive costs only if the defendant was convicted); *Aetna* (Alabama Supreme Court Justice who cast deciding vote in case recognizing bad faith tort on partial failure to pay insurance claim had similar claim pending at time, from which he received $30,000 settlement following decision); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (because he was responsible for city's finances, mayor could not sit as judge in court whose fines, forfeitures, costs and fees formed "a major part of village income"), or some showing of actual bias, *Johnson v. Mississippi*, 403 U.S. 212 (1971) (judge had been a losing defendant in a lawsuit brought by a civil rights worker, and had made disparaging remarks about civil rights workers generally; thus, he should not have adjudicated a contempt charge against the civil rights worker).[4]

Each of this Court's decisions relied upon by petitioner were cases of actual bias or interest on the part of the trial judge, not some sort of "presumed" bias petitioner claims should flow from the manner in which the case was allotted to the trial judge. Needless to say, Tyson has not remotely approached the showing made in any of the above cases.

Nor is this case remotely comparable to cases condemning the practice of racial discrimination in jury

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[4] Still other cases relied upon by Tyson involved situations where the judge in the case had not acted as a judge at all, but had assumed the role of a prosecutor. *In re Murchison* (1955) 349 U.S. 133 (judge had acted as "one-man grand jury" in investigating charges of police corruption, then tried police officer for contempt because he believed answers that officer had given were perjurious).

selection. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986). Race discrimination in jury selection has been unlawful, indeed criminal, since shortly after the civil war. *See Powers v. Ohio*, 111 S. Ct. 1364, 1367 (1991). Moreover, this prohibition is squarely grounded in the Equal Protection Clause, rather than the Due Process Clause. *Cf. Holland v. Illinois* (1990), 493 U.S. 474 (rejecting Sixth Amendment "fair cross section" challenge to the same practice). In an attempt to bridge the gulf separating those cases from his own, Tyson relies on a phrase wrenched from its context and states that "neutral selection procedures are essential because anything less 'may have some bearing on the truth finding function of a criminal trial.'" Pet. at 27 (quoting *Allen v. Hardy*, 478 U.S. 255, 259 (1986)). However, in *Allen v. Hardy*, the Court expressly declined to find that the rule of *Batson* "'goes to the heart of the truthfinding function.'" *Id.* (quoting *Solem v. Stumes*, 465 U.S. 638, 645 (1984). The rule urged by Tyson has an even more attenuated impact on the truthfinding function than the rule in *Batson* and its progeny because it is the jury, rather than the judge, that is the primary factfinder in a criminal trial. Moreover, the jury's fact finding, unlike that of a judge, is virtually unreviewable.

To the extent Tyson relies on this Court's jury selection cases to exonerate himself from showing actual bias or prejudice, it is worth noting that the Court has rejected a "tipping the scales" argument very much like the one Tyson makes here. *Lockhart v. McCree*, 476 U.S. 162, 178 (1986) ("it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance."). In this case, at the hearing on Tyson's motion, his counsel stated that even if his motion had been granted, "[w]e may well be back in this courtroom, Your Honor. That's fine by me." R. 5685. Thus, Tyson's argument would similarly require this Court to conclude that the trial judge was unconstitutionally partial when selected in

the manner in this case, but that the same judge would magically be impartial if selected by chance (which, for all the record shows, could have formed the basis for filing the grand jury petition in her courtroom).[5]

II. THIS COURT SHOULD NOT REVIEW THE INDIANA COURT OF APPEALS' FACT-SPECIFIC HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE BASED ON TYSON'S BREACH OF ITS DISCOVERY ORDER.

The Indiana Court of Appeals' holding regarding the exclusion of witnesses plainly does not warrant this Court's review. Tyson does not claim the Indiana Court of Appeals' holding creates a conflict in the law. Nor does Tyson seriously suggest that the holding contravenes any decision of this Court. Rather, Tyson urges review merely to answer several questions purportedly left unanswered by *Taylor v. Illinois*, 484 U.S. 400 (1988). But the questions Tyson labels as unanswered are not even raised by this case.

At the outset, given Tyson's attempt to manufacture issues that do not exist, it is important to clarify exactly what the Indiana Court of Appeals decided. The court found, *first*, that Tyson was under a continuing duty, expressly imposed on him by a trial-court order, to provide the prosecution with prompt notice of any witnesses that he would call to testify at trial. Pet. App. 15. *Second*, Tyson breached that duty through excessive delay in notifying the prosecution of three

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[5] After hearing evidence on the motion, the trial judge expressly found that there was no evidence to support any contention that the prosecutor had "hand-picked" the trial judge. As the trial court found, "I don't believe that there's been any evidence submitted to show that there was any reason that it was used to come to this court in deference to any other court. Therefore the presumption would be that it was done on a random basis." R. 5690-91. The Indiana Court of Appeals expressly noted this finding in its opinion. Pet. App. at 97 n.31.

witnesses whom Tyson discovered while the prosecution was in the middle of presenting its case-in-chief to the jury. Pet. App. 24-25. *Third*, the proposed testimony of the witnesses was not "vital" to Tyson's defense, because the testimony would have been offered merely to impeach the victim on a collateral matter not directly relevant to whether Tyson committed rape — *i.e.*, they could testify to whether petitioner and the victim were holding hands or embracing before they entered the hotel, but not to whether petitioner had raped the victim in the hotel room. Pet. App. 36, 39-40. The court also noted the testimony would have been cumulative. *Id.* *Fourth*, Tyson's excessive and unjustified delay in notifying the prosecution was prejudicial: Tyson, for example, enjoyed the unfair advantage of cross-examining the prosecution's witnesses based on the information obtained from the excluded witnesses that was unknown to the prosecution. Pet. App. 42. And *fifth*, the trial court did not abuse its discretion in concluding that a lesser sanction, such as a continuance, was inappropriate; allowing the excluded witnesses to testify would have required a continuance in the middle of prosecution's case "of several days and perhaps weeks, [which] could have had an adverse impact upon the [sequestered] jury." Pet. App. 45.[6] In reaching these conclusions, the Indiana Court of Appeals applied a five-factor analysis expressly developed by the Indiana Supreme Court to protect defendants' Sixth Amendment rights. *See Wiseheart v. State*, 491 N.E.2d 985, 991 (Ind. 1986); *see also* Pet. App. 15-17. Indeed, *Wiseheart*'s analysis provides defendants greater protection than is required by the Sixth Amendment.

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[6] The Indiana Court of Appeals explained that a continuance of this length would have been necessary because the prosecution would have to investigate whether the new witnesses saw Tyson with the victim, or with his girlfriend, Angela Boyd (also known as B Angie B) on the previous evening. Pet. App. 43 n.12.

Thus, even a cursory reading of the Indiana Court of Appeals' decision demonstrates that, contrary to Tyson's assertions, this case does not involve the exclusion of witnesses based on a breach of a "previously unannounced discovery rule." Pet. 30. This case does not involve "an analysis which did not even acknowledge that the defendant *has* a constitutional right to present witnesses in his own defense." Pet. 32-33 (emphasis in original). This case does not involve a holding where "[t]he only factor to which any weight was given was 'prejudice to the State.'" Pet. App. 33. And this case does not involve a question of whether "criminal discovery obligations [can] force counsel to choose between disclosing to the prosecutor potentially inculpatory witnesses before counsel expeditiously checks the bones fides of the witnesses or risking the sanction of witness preclusion." Pet. 35-36.[7] The only question this case *does* involve is whether the Sixth Amendment allows a trial court to exclude non-vital and cumulative testimony based on a breach of a clear discovery obligation that caused prejudice to the prosecution, where allowing the testimony would require a continuance of possibly several weeks in the middle of the prosecution's case.

With respect to that narrow question, this Court's jurisprudence under the Sixth Amendment's Compulsory Process Clause needs no clarification. This Court has long since established that a defendant's right to present evidence in his defense "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1967). *See also United States v. Nobles*, 422 U.S. 225, 241 (1975) ("The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the

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[7] Though petitioner has repeatedly made this last claim, he has yet to explain how the proposed witnesses could have been "potentially inculpatory."

adversarial system ...."); *cf. United States v. Dunnigan*, 113 S. Ct. 1111, 1117 (1993). In exercising his Sixth Amendment rights, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt." *Chambers*, 410 U.S. at 302. As this Court elaborated in *Taylor v. Illinois*,

> The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. . . . The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.

484 U.S. at 410-11. Accordingly, the Sixth Amendment requires a balancing of each side's interests. On the one side, the court examines whether the proposed testimony is "critical" to defendant's case. *Chambers*, 410 U.S. at 302. On the other side, the court weighs the State's interest in the procedural rule, including the prejudice to the State that would be caused by a violation of the rule, *Taylor*, 484 U.S. at 22-23, and whether the rule is "arbitrary" in excluding evidence, *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

At bottom, this balancing involves the trial court's "exercise of discretion." *Taylor*, 484 U.S. at 415. And for that reason, "it is neither necessary nor appropriate for [this Court] to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* The Indiana Supreme Court has developed somewhat more detailed guidance for the Indiana courts, and the Indiana Court of Appeals' holding obviously involved nothing more

than a fact-specific application of those guidelines. The unique facts giving rise to the issue, moreover, make it extremely unlikely to recur. Finally, it bears emphasis that the Indiana Court of Appeals' holding was correct, for the trial court did not abuse its discretion in excluding the witnesses. The Indiana intermediate court's holding does not warrant review.

III. THE STATE COURT'S REJECTION OF PETITIONER'S CLAIM REGARDING EVIDENCE OF THE VICTIM'S SEXUAL HISTORY RESTED ON THE ADEQUATE AND INDEPENDENT STATE GROUND THAT PETITIONER DID NOT MAKE A PROPER OFFER OF PROOF.

In declining to reach the merits of petitioner's claim that exclusion of evidence under the State's rape shield law, the Indiana Court of Appeals relied on a long-standing Indiana procedural rule that to preserve error regarding the exclusion of evidence, a party must make an offer of proof at trial. Pet. App. 46-53. Petitioner barely even acknowledges this holding, relegating it to the status of a footnote.[8] However, this Court not only should not, but *cannot* review a judgment resting on an adequate and independent state law ground, *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), including state rules of procedure. *See e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Nor did the Indiana Court of Appeals "announc[e] a new rule. . . and apply[] that rule retroactively" to petitioner's case, as petitioner claims. Pet. at 43-44 n.33. The general rule, requiring an offer of proof to preserve a claim that

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[8] By contrast, the lower court relegated its discussion of the *merits* of petitioner's claim to a footnote that began "[a]ssuming that the error was properly preserved for review. . .," clearly signaling that its holding rested on the procedural ground, and that its discussion of the merits of the claims was *dictum*. Pet. App. 53 n.15

evidence was erroneously excluded, has been applied in Indiana for decades. *Niehaus v. State*, 265 Ind. 655, 359 N.E.2d 513 (1977); *accord, Krempl v. State*, 186 Ind. 677, 117 N.E. 929, 929 (1917). And its application to evidence excluded under the rape shield statute is not novel. *Trevino v. State*, 428 N.E.2d 263, 268 (Ind. App. 1981) (defendant's claim that rape shield statute was unconstitutional was not considered where defendant failed to make offer of proof at trial). Thus, this is not an instance of a procedural rule which "the state court applies only irregularly." *Hathorn v. Lovorn*, 457 U.S. 255, 264-65 (1982). Rather, "there can be no pretense that the [state] court adopted its view in order to evade a constitutional issue." *Nickel v. Cole*, 256 U.S. 222, 225 (1921)[9]

The purpose of the offer of proof rule is to "allow the trial court to rule on the admissibility of the evidence within the context of the trial itself." *Trevino*, 428 N.E.2d at 268. In light of that purpose, an offer of proof was particularly necessary in this case, as petitioner's main claim seems to be that the prosecution "opened the door" to the evidence by portraying the victim as a "sexual innocen[t]." Pet. at 42-43; *see also* Pet. App. at 51. The trial court was never given the opportunity to consider this claim, and the Indiana Court of Appeals properly held the claim was not before it. He cannot now obtain review of that question in this Court.

Even if the Court *could* review petitioner's claim, it should not. As the petition itself makes clear, petitioner rests his argument on his assertion that the excluded evidence was

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[9] The two cases relied upon by petitioner, *Marks v. United States*, 430 U.S. 188 (1977), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), have nothing to do with this Court's jurisprudence regarding adequate and independent state law grounds, but stand for the not-surprising proposition that a judicial interpretation of a substantive criminal statute that broadens the statute — so as to make criminal conduct that previously was not — may not be applied retroactively.

"highly relevant in his particular case." Pet. at 39; *see also id.* at 40-43 (detailing why he believes this is so). Apart from the fact that the state court correctly rested its decision on an adequate and independent state law ground, it makes no sense for this Court to grant certiorari merely to determine the relevance of the excluded evidence.

IV. THIS COURT SHOULD NOT REVIEW THE INDIANA COURT OF APPEALS' RULING THAT PETITIONER DID NOT ADDUCE SUFFICIENT EVIDENCE TO SUPPORT INSTRUCTIONS ON STATE LAW DEFENSES.

The trial court declined to give an instruction tendered by Tyson relating to the defense of reasonable mistake of fact as to the victim's consent. The Indiana Court of Appeals affirmed this discretionary decision, finding that "there was *no evidence* in the record from which a reasonable juror could conclude that Tyson reasonably believed [the victim] consented to sexual conduct." Pet. App. 70. Thus, the question Tyson's requests this Court to review — "whether a defendant has a Constitutional right to a jury instruction supported by facts and law" — is not presented by this case. Pet. i. Moreover, the Indiana Court of Appeals' holding on this issue rested entirely on state-law grounds.

As Tyson concedes in his petition, the defense of mistake of fact is purely a matter of Indiana state law. Pet. 49. The Indiana Court of Appeals' finding that the record contained no evidence to support the giving of Tyson's tendered instructions necessarily rested on its construction of this state-law defense. Specifically, the court relied on long-standing Indiana law interpreting the defense to require that a mistake of fact as to the victim's consent be reasonable both subjectively and objectively. Pet. App. 70-71. Based on Indiana's construction of the objective reasonableness

requirement, the court concluded that there was no evidence in this case to support that standard. Pet. App. 72-89.[10]

As a prerequisite to granting review of the question contained in Tyson's petition, this Court would have to reject the Indiana courts' construction of Indiana law. This Court would have to reinterpret Indiana's standard for objective reasonableness of the mistaken belief as to the victim's consent in a manner that would allow the evidence here to support that standard. But this Court obviously has no jurisdiction to review an Indiana court's construction of its own law. Indiana's construction of its own law provides an adequate and independent state-law ground for its holding. *E.g.*, *Coleman v. Thompson*, 111 S. Ct. 2546, 2554 (1991); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

Tyson is therefore incorrect that this case conflicts with *Mathews v. United States*, 485 U.S. 58 (1988) and *Whipple v. Duckworth*, 957 F.2d 418 (7th Cir.), *cert. denied*, 113 S. Ct. 218 (1993). As Tyson acknowledges, *Mathews* involved the construction of a *federal* statute, which plainly vested this Court with jurisdiction. Pet. 55. And *Whipple* actually

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[10] Tyson's statement that the Indiana Court of Appeals' holding was based on an examination of only the victim's testimony, and not that of Tyson, is categorically false, as demonstrated by the most casual review of the court's decision. *E.g.*, Pet. App. A-74 ("To determine whether there is evidence that Tyson's assumed belief was reasonable, we look to *his* description of the encounter.") (emphasis added); Pet. App. 83 ("However, an examination of the testimony of [the victim] *and Tyson*, the only testimony available as to the events in the hotel room, reveals evidence on only consent or compulsion; there is no evidence of equivocal conduct that a reasonable person in Tyson's position could have reasonably misinterpreted as [the victim's] consent to the charged sexual conduct."). Equally false is Tyson's assertion that the Indiana Court of Appeals' holding precluded him from offering inconsistent defenses. The court found simply that, notwithstanding the defenses theoretically available to him, Tyson introduced evidence of only one defense — actual consent.

supports the proposition that this Court lacks jurisdiction to review Indiana's construction of its state-law defenses. In *Whipple*, as in this case, the defendant complained that the state court erred by failing to give an instruction on a state-law defense. The Seventh Circuit rejected this claim, finding that a federal court had no jurisdiction to construe the state-law defense differently than the state court. *Id.* at 422-23. Thus, the Indiana Court of Appeals' construction of the defense of mistake of fact does not warrant this Court's review.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 7, 1994